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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

EALISE CRUMB,

Plaintiff and Appellant,

v.

KMART CORPORATION, et al.,

Defendants and Respondents.

B202374

(L.A. Co. Super. Ct. No. BC 347994)

APPEAL from an order of the Superior Court of Los Angeles County.

Gregory W. Alarcon, Judge. Affirmed.

Ealise Crumb, in pro. per., and for Plaintiff and Appellant.

Reed Smith, Scott H. Jacobs, Judith E. Posner and Jordan S. Yu for
Defendants and Respondents.

Plaintiff Ealise Crumb appeals from the order granting terminating sanctions and dismissing her action alleging racial discrimination in connection with her purchase of a television set at a store of defendant Kmart Corporation. Crumb also named Sears Holding Company as a defendant because it had purchased Kmart (defendants are referred to as Kmart). Because we conclude the court properly granted terminating sanctions, we need not address the other issues raised by Crumb.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Pleadings

A. The Complaint

On February 24, 2006, Crumb filed a complaint against Kmart alleging that Kmart employees had discriminated against her based on her race by requiring her to pay for a television set at the electronics department, as opposed to the main register, and then asking her if she had paid for the television set when she attempted to leave the main register without showing the clerk her receipt. The complaint asserted causes of action for: violation of the Unruh Civil Rights Act (Unruh Act), violation of the California Constitution's provision against employment discrimination based on race, defamation, negligence, and fraud and deceit.

B. Kmart's Demurrer and Motion To Strike

On May 1, Kmart filed a demurrer to all causes of action and a motion to strike improper requests, which included attorney's fees, loss of earnings and employment benefits, punitive damages and injunctive relief, such as an order requiring Kmart place African Americans as exit monitors and hire more English speaking employees.

The court sustained without leave to amend the demurrer to the constitutional and defamation claims, sustained with leave to amend the claims for negligence and violation of the Unruh Act, overruled the demurrer to the fraud and deceit claim and the general demurrer as to Sears. The court granted without leave to amend the motion to strike the requests for attorney's fees, loss of earnings, employment benefits and injunctive relief. The court struck the punitive damages, but gave Crumb leave to amend that claim.

C. Amended Complaint

On August 4, Crumb filed a first amended complaint which deleted the constitutional and defamation claims and amended the claims for violation of the Unruh Act, negligence and punitive damages. The amended complaint violated the court's order by again requesting attorney's fees, loss of earnings, employment benefits and injunctive relief.

Although Kmart made numerous attempts to stipulate with Crumb to the filing of a second amended complaint conforming to the court order, the parties were not able to reach an agreement. Kmart then filed a second motion to strike. For the second time, the court struck the inappropriate requests. Crumb moved for reconsideration of the order granting the second motion to strike. The court denied the motion for reconsideration, finding it "ambiguous, and indiscernible."

II. Discovery

A. Motion to Compel

On April 13, Crumb served a set of requests for production on Kmart, to which Kmart timely served responses and objections. On July 18, more than 45 days after Kmart had served responses and objections such that Crumb had waived her right to further responses, Crumb served a second set of requests for production, which sought

documents already requested in the first set, as well as the “identification” of numerous Kmart employees. Despite those defects, Kmart offered to produce relevant and responsive documents subject to the entry of a mutually acceptable protective order and to coordinate the depositions of potential non-party witnesses so Crumb could avoid having to issue subpoenas. Crumb rejected the meet and confer efforts.

Crumb moved to compel further responses to her second set of requests for production, advancing numerous arguments. The court denied the motion to compel, concluding that Crumb had failed to meaningfully meet and confer with Kmart as required prior to filing her discovery motion. The court also denied Crumb’s subsequent motion for reconsideration, ruling, “Plaintiff merely re-asserts her arguments found in the moving papers of the discovery motion. A Motion for Reconsideration is not an opportunity for Plaintiff to re-argue the discovery motion.”

B. Crumb’s Deposition

1. Four Notices

To discover the factual basis of Crumb’s allegations, Kmart noticed Crumb’s deposition for October 10, 2006. Crumb, citing an alleged scheduling conflict, cancelled her deposition. Subsequently, Kmart noticed Crumb’s deposition for November 14. On about November 13, without serving any prior objection or providing any explanation, Crumb again cancelled her deposition.

On December 6, Crumb informed Kmart she was attending physical therapy for injuries sustained in an unrelated car accident and could proceed with her deposition on any Tuesday or Thursday if the deposition was limited to three hours a day. Kmart agreed to those restrictions and noticed Crumb’s deposition for Tuesday, December 19. On December 18, one day before the deposition, Crumb cancelled her deposition for the third time.

On December 27, Kmart requested future possible deposition dates from Crumb. Crumb stated she would provide potential dates after her next doctor's appointment, stating she had been ill with pneumonia. Because the deadline for Kmart to file a motion for summary judgment was approaching, and Crumb had yet to appear for her deposition, Kmart requested that Crumb stipulate to shorten the 75 day notice period for a motion for summary judgment to allow Kmart to meaningfully exercise its right to move for summary judgment. Crumb refused. On February 21, 2007, Kmart moved ex parte to continue the then trial date of June 12 on the ground that Crumb's repeated failure to attend her deposition precluded Kmart from moving for summary judgment. The court granted the requested relief and continued the trial date to August 28.

Shortly thereafter, on March 13, based on a doctor's note provided by Crumb indicating her ability to attend her deposition, Kmart noticed Crumb's deposition for March 28. Not receiving any objection to the notice, Kmart sent Crumb a courtesy letter on March 27 confirming the deposition. On March 27, at 4:00 p.m., less than 24 hours before the deposition was to commence, Crumb faxed a letter to Kmart's counsel stating she would not attend her deposition.

2. Court Order

On April 2, after four failed deposition notices with dates spanning five months, Kmart moved to compel Crumb's deposition. Kmart sent a letter to Crumb advising her it would take the motion to compel off-calendar if she concluded her deposition while the motion was pending. Crumb did not respond to the letter or oppose the motion to compel.

On April 26, the court granted Kmart's motion and ordered Crumb to appear for and conclude her deposition by May 3, finding, "Plaintiff's testimony is crucial to the case and has been postponed for too long." After examining the reasons Crumb had given Kmart for failing to attend her deposition, the court concluded, "As the car accident

and pneumonia were in December, Plaintiff has had time to recover. Defendant has been flexible in working around Plaintiff's injuries. The court believes the deposition should be conducted as soon as possible." Although the court denied Kmart's request for a continuance of the trial date, the court stated it would permit Kmart to notice a summary judgment hearing within 30 days of the trial date.

Because Crumb did not attend the motion to compel hearing, Kmart's counsel left Crumb a voicemail message immediately after the hearing advising her of the court's order and informing her that Kmart would take her deposition on April 30. That same day, Kmart also served Crumb with a notice of ruling on the motion to compel accompanied by a notice of deposition for April 30 and a cover letter. The cover letter stated Kmart was also available to depose Crumb on May 1 or May 2. The next day, Crumb called Kmart's counsel and stated that the deposition set for April 30 needed to be continued to May 3. Counsel accommodated Crumb and agreed to the continuance.

On May 3, at 9:50 a.m., just 10 minutes before the deposition was to commence, and after the court reporter and videographer had finished their set-up and Kmart's counsel had completed preparations for the deposition, Crumb called counsel and once again cancelled her deposition without explanation. During that call, Crumb told Kmart's counsel that the court could not order her to attend her deposition by a certain date.

C. Terminating Sanction

On May 18, Kmart moved for terminating sanctions, requesting dismissal of Crumb's complaint.

Crumb filed opposition. Crumb did not dispute that Kmart had attempted for eight months to depose her nor did she dispute that she knowingly had defied the court order compelling her deposition. Crumb also did not dispute telling Kmart's counsel that the court could not compel her to attend her deposition by a certain date. Crumb reiterated she had not appeared for deposition over the eight-month period due to an unrelated car

accident, physical therapy, pneumonia, burns on her body caused by units to treat her pain, and her taking numerous prescription medications that allegedly inhibit accurate testimony. Crumb asserted, “[p]eople get sick and there is nothing anyone can do about it.”

On June 21, the court granted Kmart’s motion for terminating sanctions, finding:

Defendant properly noticed Plaintiff of five depositions over eight [sic] months from October 10, 2006 to May 3, 2007. Before each scheduled deposition, Plaintiff gave Defendant various reasons as to why she was unable to attend. On at least three occasions, Plaintiff informed Defendant when she would be available for her deposition, but even after Defendant arranged the deposition according to her schedule, Plaintiff failed to make herself available.

The court also recognized that Crumb had disregarded its order compelling her deposition, finding terminating sanctions were appropriate because Crumb “should not be permitted to continue to litigate after benefiting from her evasion of this court’s discovery order.” The court entered an order striking Crumb’s complaint and dismissing her action.

Crumb filed a timely notice of appeal from the order of dismissal.

DISCUSSION

Crumb contends the court abused its discretion when it granted Kmart’s motion for terminating sanctions. “We review discovery orders for an abuse of discretion.” (*Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc.* (2008) 163 Cal.App.4th 1093, 1102.) There are only two absolute prerequisites to imposition of a discovery sanction: (1) there must be a failure to comply, and (2) the failure must be willful. (*Ibid.*) The choice of which discovery sanction to impose is “subject to reversal only for manifest abuse exceeding the bounds of reason.” (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.)

It is appellant's burden to affirmatively demonstrate the court erred in dismissing her complaint. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487 disapproved on another point in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.) A defendant does not have a burden to show it was prejudiced by a plaintiff's dilatory conduct, only that the plaintiff willfully failed to comply with discovery. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 37.)

““[W]ilful failure” does not necessarily include a wrongful intent to disobey the rule. A conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance, is sufficient to invoke the penalty.”” (*Snyder v. Superior Court* (1970) 9 Cal.App.3d 579, 587.) Appellant's failure to appear for her court-ordered deposition was a conscious or intentional act, not an involuntary one. (See *Housing Authority v. Gomez* (1972) 26 Cal.App.3d 366, 372 [The defendant stipulated to and the court ordered the defendant be deposed on a certain date, when the defendant chose to ignore the stipulation and court order, the court concluded the “taking of such a calculated risk was wilful conduct.”].) A failure to comply is a refusal to comply. (See *Societe Internationale v. Rogers* (1958) 357 U.S. 197, 207-208.)

“A trial court may impose sanctions, including terminating sanctions, for a party's misuse of the discovery process, which includes disobedience of a court order.” (*Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 207; see Code Civ. Proc., §§ 2023.010, subs. (d) & (g); 2023.030, subd. (d)(3).) Where the dereliction of a party's discovery obligations is attributable to the litigant rather than an attorney, as here, terminating sanctions are even more appropriate. (See *Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799.)

Prior to the court issuing an order compelling Crumb's deposition, she had been served with notices of four different deposition dates. On September 26, 2006, Crumb cancelled her deposition noticed for October 10 due to an alleged scheduling conflict. That was the only time Crumb gave more than one day notice of cancelling her

deposition. Subsequently, Kmart noticed three other deposition dates, two after consulting with Crumb, and even agreed to her requests as to which days of the week she could be deposed and her three hour time limit for being deposed. Crumb cancelled all three of those deposition dates the day before they were scheduled.

During the same time period, because Crumb had yet to appear for her deposition, Kmart requested that Crumb stipulate to shorten the 75 day notice period for a motion for summary judgment. Despite Kmart's accommodation to Crumb's requests, she refused.

After the four failed deposition notices with dates spanning five months, Kmart moved to compel Crumb's deposition. Kmart even sent a letter to Crumb advising her it would take the motion to compel off-calendar if she concluded her deposition while the motion was pending. Crumb did not respond to the letter or oppose the motion to compel or appear at the hearing on the motion.

On April 26, the court granted Kmart's motion and ordered Crumb to appear for and conclude her deposition by May 3, finding, "Plaintiff's testimony is crucial to the case and has been postponed for too long." After examining the reasons Crumb had given Kmart for failing to attend her deposition, the court concluded, "As the car accident and pneumonia were in December, Plaintiff has had time to recover. Defendant has been flexible in working around Plaintiff's injuries. The court believes the deposition should be conducted as soon as possible."

Because Crumb did not attend the motion to compel hearing, Kmart's counsel left Crumb a voicemail message immediately after the hearing advising her of the court's order and informing her that Kmart would take her deposition on April 30. That same day, Kmart also served Crumb with a notice of ruling on the motion to compel accompanied by a notice of deposition for April 30 and a cover letter. The cover letter stated Kmart was also available to depose Crumb on May 1 or May 2. The next day, Crumb called Kmart's counsel and stated that the deposition set for April 30 needed to be continued to May 3. Counsel once again accommodated Crumb and agreed to the continuance.

On May 3, at 9:50 a.m., just 10 minutes before the deposition was to commence, and after the court reporter and videographer had finished their set-up and Kmart's counsel had completed preparations for the deposition, Crumb called counsel and once again cancelled her deposition without providing any explanation. During that call, Crumb told Kmart's counsel that the court could not order her to attend her deposition by a certain date.

Subsequently, Kmart moved for terminating sanctions and requested dismissal of Crumb's complaint. The court granted the motion, finding:

Defendant properly noticed Plaintiff of five depositions over eight [sic] months from October 10, 2006 to May 3, 2007. Before each scheduled deposition, Plaintiff gave Defendant various reasons as to why she was unable to attend. On at least three occasions, Plaintiff informed Defendant when she would be available for her deposition, but even after Defendant arranged the deposition according to her schedule, Plaintiff failed to make herself available.

The court also found that Crumb "willfully chose to not attend the [May 3] deposition," Crumb "made no showing that she attempted to continue or seek relief from the May 3 deposition," Kmart was precluded from preparing a meaningful defense or exercising its right to move for summary judgment, and terminating sanctions were appropriate where imposition of a lesser sanction would permit Crumb "to benefit from her stalling tactics," and Crumb "should not be permitted to continue to litigate after benefiting from her evasion of this court's discovery order." The court's finding of willfulness is entitled to deference on appeal. (*Alliance Bank v. Murray* (1984) 161 Cal.App.3d 1, 10.)

Crumb urges that Kmart intentionally continued to schedule her deposition when it knew she was ill, the court used the terminating sanction as a weapon to punish her and place Kmart in a better position, she did not deliberately fail to cooperate but was ill and

under medical care and let Kmart know of her condition, and she did not attend the depositions set by Kmart because she was too ill to attend. Crumb's arguments are without merit.

"The penalty should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. Where a motion to compel has previously been granted, the sanction should not operate in such a fashion as to put the prevailing party in a better position than he would have had if he had obtained the discovery sought and it had been completely favorable to his cause. [¶] The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. However, there is no question that a court is empowered to apply the ultimate sanction against a litigant who persists in the outright refusal to comply with his discovery obligations." (Citations omitted.) (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 793; see also *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 795 ["Preventing parties from presenting their cases on the merits is a drastic measure; terminating sanctions should only be ordered when there has been previous noncompliance with a rule or order and it appears a less severe sanction would not be effective. Terminating sanctions should not be ordered as a first response when noncompliance is through no fault of the party."].)

In the case at bar, prior to the court issuing terminating sanctions, appellant had failed to appear for four noticed depositions nor had appellant complied with the court's order to complete her deposition by May 3; as a matter of fact, without any explanation at the time, appellant cancelled that deposition 10 minutes before it was scheduled to begin. Thus, the terminating sanction was not a first response to Crumb's refusal to be deposed.

As noted by the court, a lesser sanction would not be effective as appellant continued to use her illness as an excuse to not even attempt to be deposed. Crumb indicates that if she had shown up for a deposition, she would have answered the standard introductory admonitions/questions and stated she was taking medications which interfered with her ability to answer questions, she was suffering from pain which would

have interfered with her ability to comprehend questions, and she had burns which made it difficult to sit. In addition, Crumb had told Kmart's counsel the court could not order her to be deposed by a certain date. Without appellant's deposition, Kmart would have been at a distinct disadvantage as it was being deprived of the opportunity to prepare a meaningful defense for a trial which was less than four months away. Thus, the court could infer no other remedy would change Crumb's conduct.

Appellant suggests Kmart could have used other discovery methods to get the information it wanted. Appellant cannot dictate which discovery method must be used by an opposing party. As noted by the court, given the nature of the case, appellant's deposition was crucial. Appellant claims the court did not examine all her evidence and complains the court did not list all of her evidence in its order. The court stated it had given full consideration to the evidence, arguments and authorities of the parties, and it had no obligation to list all the evidence in its order only its ruling.

Kmart cooperated with Crumb to arrange a date for her convenience, but other than informing Kmart she was ill, Crumb did not make a good faith effort to cooperate with Kmart or the court. (Compare *Societe Internationale v. Rogers*, *supra*, 357 U.S. at pp. 208-213.) Thus, given Crumb's on-going evasion of her responsibility to be deposed after four noticed dates, most of which had been arranged to accommodate her schedule, her disregard of the court order to complete her deposition by May 3 without any explanation for her failure to appear or her seeking relief from the court, the approaching trial date, and Crumb's unwillingness to shorten time for a summary judgment motion, the court did not abuse its discretion by granting terminating sanctions and dismissing Crumb's complaint.

DISPOSITION

The order is affirmed. Kmart to recover costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.